Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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NO. 751

In the Supreme Court of the United States

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,
Petitioner,

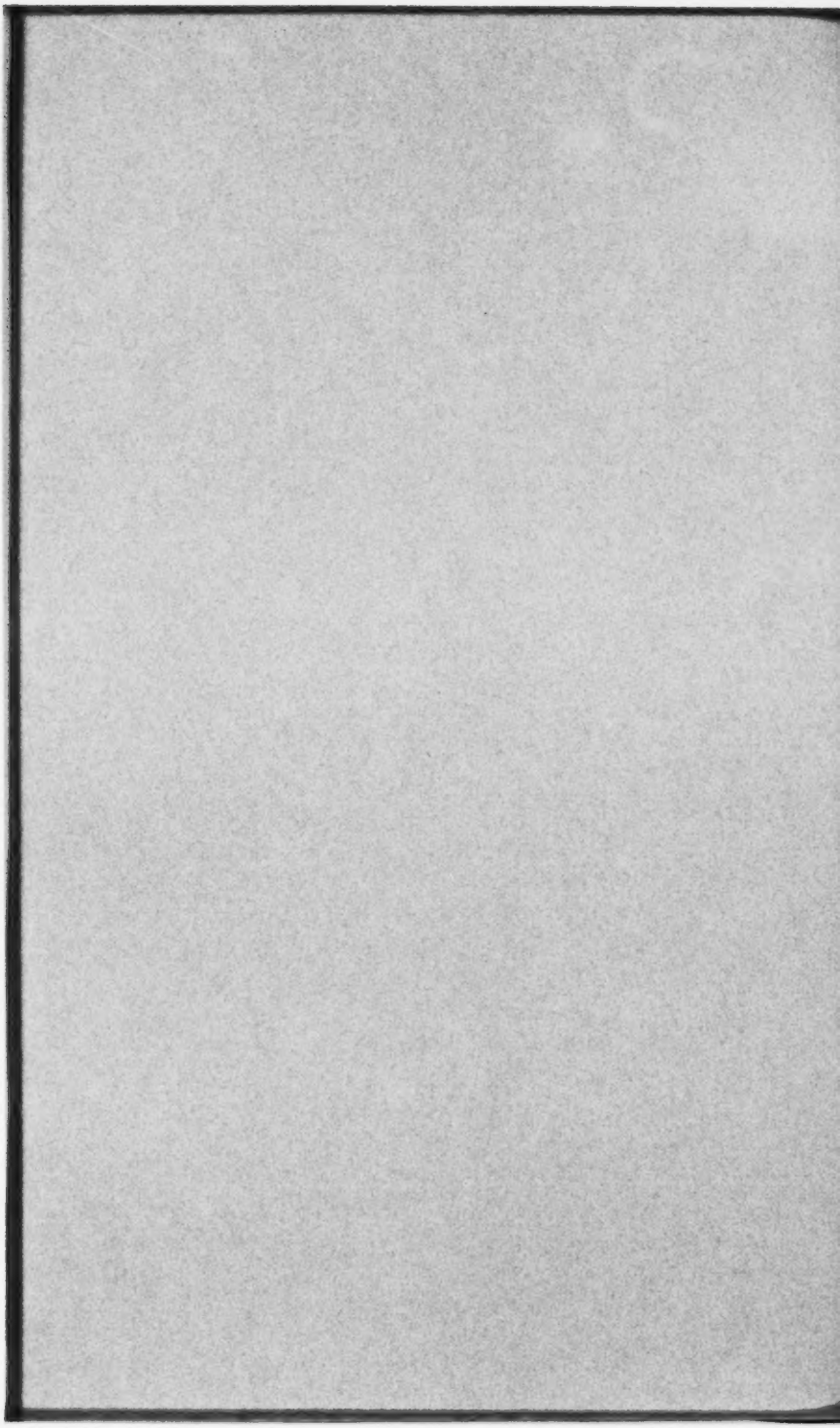
VERSUS

BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

PETITION AMICUS CURIAE OF THE STATE OF OKLAHOMA, EX REL. W. A. PAT MURPHY, COMMISSIONER OF LABOR, REQUESTING THAT CERTIORARI BE GRANTED AS PRAYED BY THE PETITIONER

MAC Q. WILLIAMSON,
Attorney General, State of Oklahoma,

PEYTON FORD,
Chief Attorney, Unemployment Compensation and Placement Division, Department of Labor, State of Oklahoma (Of Counsel).



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Page

Acts of 1939, Ch. 121, Sec. 2(g)(4), Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4) Baldwin's 1939 Supp. 2

Benner-Coryell Lumber Company, Inc., v. Indiana Unemployment Compensation Board, 29 N. E. (2d) 776 2

Gibson Products Company, Inc., et al., v. W. A. Pat Murphy, State Labor Commissioner et al., 186 Okla. 714, 100 Pac. (2d) 453 2

Independent Gasoline Company v. Bureau of Unemployment Compensation, 10 S. E. (2d) 58 (cert. den. by this Court, Nov. 25, 1940; 61 Sup. Ct. 175) 3

Sec. 10(f)(4), Art. 2, Chap. 52, Oklahoma Session Laws 1939 2

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INDIANA UNEMPLOYMENT COMPENSATION BOARD,
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BENNER-CORYELL LUMBER COMPANY, INC.,
Respondent.

PETITION AMICUS CURIAE OF THE STATE OF OKLAHOMA, EX REL. W. A. PAT MURPHY, COMMISSIONER OF LABOR, REQUESTING THAT CERTIORARI BE GRANTED AS PRAYED BY THE PETITIONER

Comes now the State of Oklahoma *ex rel.* W. A. Pat Murphy, Commissioner of Labor, as *amicus curiae,* and respectfully prays this Honorable Court to give appropriate consideration to this petition, in connection with the petition to grant certiorari as prayed for by the petitioner in the above styled cause, and for its reasons states:

1.

That a decision by this Court is both desirable and of great public interest to the State of Oklahoma for the reason that Section 10(f)(4) of the Oklahoma Unemployment Compensation Law (Sec. 10(f)(4), Art. 2, Chap. 52,

Oklahoma Session Laws, 1939)[1] is, with minor and immaterial exceptions, identical with Section 2(g)(4) of the Indiana Unemployment Compensation Law (Sec. 2(g)(f), Act of 1939, Chap. 121, Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4), Baldwin's 1939 Supplement)[2], the validity of which was struck down by the Supreme Court of Indiana in the case of *Benner-Coryell Lumber Company, Inc.*, v. *Indiana Unemployment Compensation Board*, 29 N. E. (2d) 776, sought to be reviewed here.

2.

That the Supreme Court of Oklahoma in the case of *Gibson Products Company, Inc., et al.*, v. *W. A. Pat Murphy, State Labor Commissioner et al.*, 186 Okla. 714, 100

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[1]"Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly by the same interest, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection." (Sec. 10(f)(4), Art. 2, Chap. 52, Oklahoma Session Laws 1939.)

[2]"Any employing unit which together with one (1) or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection." (Acts of 1939, Ch. 121, Sec. 2(g)(4), Sec. 52 - 1502(g)(f) Burns 1933 Pocket Supplement, Sec. 10168 - 2(g)(4) Baldwin's 1939 Supp.)

Pac. (2d) 453, on February 27, 1940 sustained, under constitutional attack, the validity of Section 10(f)(4), *supra*, of the Oklahoma Unemployment Compensation Law, and while an examination of this case does not reveal that the Fourteenth Amendment to the Federal Constitution, which guarantees to citizens (including corporations) equal protection of the laws, was considered, a reading of the brief filed by the Gibson Products Company, Inc., plaintiff in error shows that this question was presented to the Supreme Court of Oklahoma in said case.

3.

That as a result of the decision of the Oklahoma Supreme Court in the Gibson Products Company, Inc., case, *supra*, the Division of Unemployment Compensation and Placement of the State Department of Labor has determined that approximately 800 employers are subject to the provisions of the Oklahoma Unemployment Compensation Law by reason of Section 10(f)(4) thereof, and a total of approximately 4,000 employees of the aforementioned 800 employers were within the purview of said Oklahoma Unemployment Compensation Law.

4.

That as a result of the decision of the Supreme Court of Indiana in the Benner-Coryell Lumber Company, Inc., case, *supra*, and the decision of the Supreme Court of Georgia in the case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation*, 10 S. E. (2d)

58 (certiorari denied by this Court on November 25, 1940; 61 Sup. Ct. 175), there has arisen in this State great confusion among the 800 employers and 4,000 employees as to their status under the provisions of Section 10(f)(4) of the Oklahoma Unemployment Compensation Law. From this it has inevitably followed that the administrators of the Division of the Unemployment Compensation and Placement of the Oklahoma State Department of Labor are confronted with disturbing and almost insurmountable administrative difficulties in view of the conflicting interpretation of similar provisions in other states. The questionable status of both employers and employees, and the administrative difficulties attached thereto must necessarily continue until the law has been interpreted and settled by this Honorable Court.

Wherefore, the State of Oklahoma ex rel. W. A. Pat Murphy, Commissioner of Labor, respectfully prays this Honorable Court to grant the petition of the petitioner herein.

MAC Q. WILLIAMSON,
Attorney General, State of Oklahoma,

PEYTON FORD,
Chief Attorney, Unemployment Compensation and Placement Division, Department of Labor, State of Oklahoma (Of Counsel).

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In the Supreme Court of the United States

OCTOBER TERM, 1940

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THE INDIANA
UNEMPLOYMENT COMPENSATION BOARD,
Petitioner

vs.

BENNER-CORYELL
LUMBER COMPANY, INCORPORATED

NUMBER 751

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF NEW MEXICO AS AMICUS CURIAE

EDWARD P. CHASE,
The Attorney-General of New Mexico.

J. R. MODRALL,
Special Attorney for the Unemployment Compensation Commission.

A. M. FRAZIER,
Attorney for the Unemployment Compensation Commission.
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THE INDIANA
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VS.

BENNER-CORYELL
LUMBER COMPANY, INCORPORATED

NUMBER 751

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF NEW MEXICO AS AMICUS CURIAE

The Unemployment Compensation Commission of New Mexico (hereinafter referred to for convenience as the Commission), being an agency legally constituted to administer the Unemployment Compensation Law of that State, respectfully presents this brief as amicus curiae in the above entitled cause in support of the Petition of the Indiana Unemployment Compensation Board therein for a writ of certiorari. The Indiana agency asks a review of the decision of the high court of Indiana in the case of Benner-Coryell Lumber Company, Inc. v. Indiana Unemployment Compensation Board,—Indiana—, 29 N. E. (2nd) 776, wherein it was held that a provision of the Indiana

Unemployment Compensation Law, so far as it authorized the combining of employment of two or more commonly controlled corporations for the purpose of establishing liability, was invalid as contravening the fourteenth amendment to the Federal Constitution.

SUMMARY OF ARGUMENT

I. The Commission, as amicus curiae herein, has a substantial interest and concern in the review asked because it is charged with the administration of a statutory provision similar to that invalidated by the Indiana court.

II. The Commission has interpreted and enforced this statutory provision in the manner now condemned, by which employing units not otherwise liable have been made subject and their employees brought within the Act's protection.

III. The adoption by the New Mexico courts of the Indiana decision, upon the suit of an employer thus affected, would surround the Commission's past and present acts with confusion.

IV. The Commission believes that the decision of the Indiana court condemns a legislative classification for determination of subject employers which is sound.

I.

The Commission has a substantial interest and concern in the review asked because it is charged with the

administration of a statutory provision similar to that invalidated by the Indiana court.

Section 19, (f) (4), Chapter 1, Laws of New Mexico, Special Session of 1936:

((f) Employer means:)

(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise) and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection.

Paragraph (1) of this subsection, to be read with the above, was as follows as first enacted:

((f) Employer means:)

(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); (Chapter 1, Laws of New Mexico, Special Session of 1936).

This provision is similar to the present Indiana Law. Subsequently the New Mexico legislature amended it to extend to employers of four or more in twenty weeks (Chapter 129, Laws of 1937), and again later to employing units having two or more employees in any thirteen weeks or a total quarterly payroll equalling $450.00 (Chapter 175, Laws of 1939). This last amendment became effective July 1, 1939, and therefore, with respect to prior periods, the Commission was and is in much the same position as Petitioner in the matter set out in its petition and brief.

II.

The Commission has interpreted and enforced this statutory provision in the manner now condemned, by which employing units not otherwise liable have been made subject and their employees brought within the protection of the Act.

As early as February 12, 1937, only two months after the Act first took effect, counsel for the Commission were asked for and supplied an interpretation of the common control clause. This interpretation and others submitted since, in all of which the several members of the Commission's legal staff have concurred, were the same in effect as that argued for by Petitioner. The result is that the Commission, on the basis of such interpretation, has established the liability of employing units as "employers", required and collected contributions from them, and has paid compensation or benefits to individuals on account of work done for such employers. The benefit and protec-

tion of the law were thus brought to many workers who otherwise would have been subject to all those harsh effects of unemployment which the Act was designed to alleviate. The continuing concern of the New Mexico legislature that the protection of the Act be extended to more and more workers is shown by its repeated amendment and extension of the coverage provisions, as noted in paragraph number 1 above. It may be inferred from this that the legislature intended other coverage provisions, such as the common control clause, to have the broadest possible meaning.

III.

The adoption by the New Mexico courts of the Indiana decision, upon the suit of an employer thus affected, would surround the Commission's past and present acts with confusion.

The seriousness and complexity of the situation resulting from invalidation of the common control clause by the courts of the various states having such a provision, gives weight to Petitioner's request for review and adds to the Commission's concern and interest in the issue. Doubt and uncertainty would be thrown about the status of persons who had drawn or might be drawing benefits on account of work for employers whose liability had been established under the common control provision. The Commission, in the event that this provision of the New Mexico Act were held invalid, might be the object of numerous suits by employers from whom contributions have been required and collected under its authority.

IV.

The Commission believes that the decision of the Indiana court condemns a legislative classification for determination of employers which is reasonable.

The various legislatures may have foreseen that corporations A and B, owned by the same interests and each employing five individuals, might be in competition with corporation C which alone had ten employees. The inequity of allowing the common owners of corporations A and B to escape liability, while corporation C was made subject, would be at least as great as that in the example used conversely by the Indiana court and by the Georgia court (Independent Gasoline Company v. Bureau of Unemployment Compensation,—Georgia—, 10 S.E. (2nd) 58), which decision the former cites with approval. If A and B corporations escaped, a strong inducement would be on C corporation to divide similarly, and thus four corporations and their twenty employees would be outside the law, though the two sets of interests would each be enjoying the benefits and profits derived from the employment of ten workers.

How to guard against the inequities resulting from the multiplication of such situations, without employing a method of classification producing greater inequities, was the legislative task. In doing so the legislature might well disregard the fiction of separate corporate entities and look to see who were the persons controlling and directing the employment and, by reason of their ownership, reaping the profits from such employment. In the phrase "owned

or controlled by the same interests'' the legislatures seem to have chosen a reasonable and logical standard for determining whether the relationship of several affiliated corporations might justify the treatment of their employment together for the purposes of the unemployment compensation laws.

The Petitioner imposed liability on two Indiana Corporations by reason of one individual's ownership of a majority of the stock in both. In condemning this, the Indiana court considered some matters not clearly relevant, such as that corporations made liable in this manner might not be in the same business or might be in different communities, and that ownership of stock is a thing which may and does change often. With reference to the court's discussion of the latter phenomenon, it is to be noted that only corporations with less than eight employees could be affected by the common control provision under discussion, since all with more than eight employees would be liable each in its own right. As to those small corporations affected, it may be said that they are with some exceptions, of the type commonly devised by an individual business man the better to run his own business, and that the stock of such corporations commonly has a more or less fixed ownership. Where the same individual owns controlling stock in more than one such corporation, it simply means in many cases that such a business man is branching out a little as his profits warrant. In such circumstances it could never be said that the legislative classification of employers represented by the common control provision nor the interpretation placed upon it by the Petitioner is unreasonable for the purposes of an unemployment compensation law or inequitable in its broad effects.

The nature of the business carried on by the several corporations and their locations with respect to each other would hardly seem to be matters for consideration in determining whether the legislature has in this instance adopted a reasonable classification of employers for imposition of the tax. Considering the provision in question not only from the latter standpoint, but also as part of an act designed primarily to relieve unemployment, the true criteria by which to measure its validity would seem to be whether the same interest or interests control and direct the employment of several corporations so that the persons employed are in actuality working for the same employer, and whether the same interest or interests reap the greater part of the profits and benefits from the employment of the several corporations.

EDWARD P. CHASE,
The Attorney-General of New Mexico.

J. R. MODRALL,
Special Attorney for the Unemployment Compensation Commission.

A. M. FRAZIER,
Attorney for the Unemployment Compensation Commission.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

INDIANA UNEMPLOYMENT COMPENSATION BOARD, *Petitioner*,

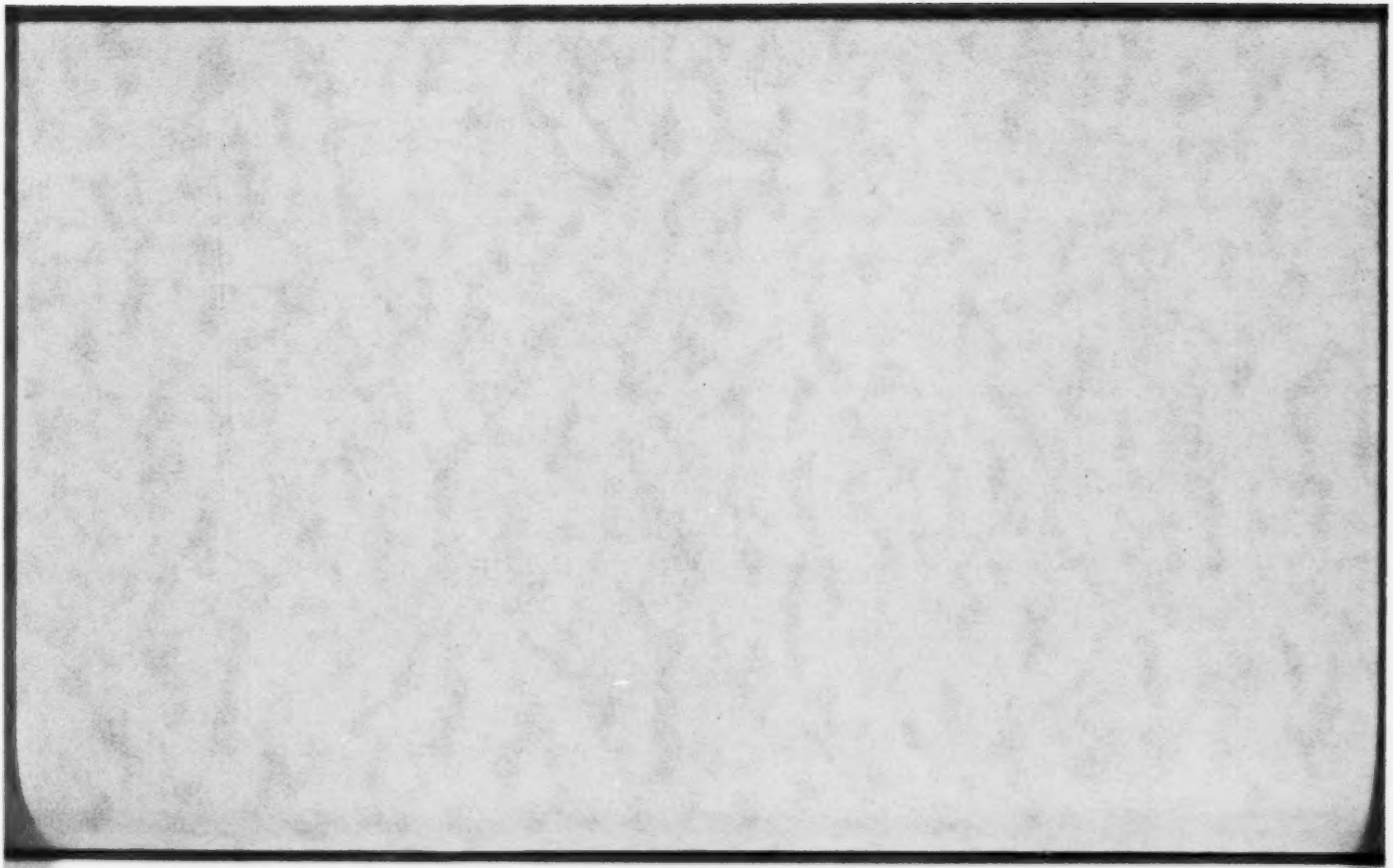
vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED, *Respondent*.

PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR THE UNEMPLOYMENT COMPENSATION COMMISSION OF MISSOURI SUBMITTED AS A FRIEND OF THE COURT.

HARRY G. WALTNER, JR.,
Chief Counsel
Unemployment Compensation
Commission of Missouri.



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INDIANA UNEMPLOYMENT COMPENSATION BOARD, *Petitioner*,

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PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE UNEMPLOYMENT COMPENSATION COMMISSION OF MISSOURI SUBMITTED AS A FRIEND OF THE COURT.

IF IT SO PLEASE THE COURT:

This brief is presented on behalf of the State of Missouri acting through the Unemployment Compensation Commission, a statutory body charged with the duty of administering the Missouri Unemployment Compensation Law. (Sections 4 and 5 of the Missouri Unemployment Compensation Law, page 574, Laws of Missouri 1937; Section 5 of the Missouri Unemployment Compensation Law, page 894, Laws of Missouri 1939.) Under such statute the Commission has the power and the duty to appoint counsel to represent the State

in the administration of this Law (Section 5 (d) supra). This brief is not filed by the attorney general of the State, such official while being a constitutional officer, his duties are fixed by law (Section 1, Article V, Constitution of Missouri), and the Unemployment Compensation Law places no duty on the attorney general in respect to its administration.

The State of Missouri and the Unemployment Compensation Commission are directly affected by the outcome of this case, as Section 3 (h)(4) of the Missouri Unemployment Compensation Law is almost identical with the Indiana Law which has been erroneously construed by the highest court of that State. This section reads as follows:

> " 'Employer' means"
>
> * * * * *
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled by legally enforceable means or otherwise, directly or indirectly, by the same interests, or which owns or controls one or more other employing units by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;"

Not only is this section of the Missouri Law directly affected by this decision, but the basis upon which it is rendered could logically support a decision holding void other sub-sections of the Missouri Unemployment Compensation Law which would have a disastrous effect upon the administration of the Missouri Act. By these sub-sections, the Missouri Legislature in an analogous manner defined certain employing units, not necessarily employing eight workers, to be employers under the Law. The sub-sections are identified as Section 3 (h)(2) and Section 3 (h)(3) of the Missouri Act (Laws of Missouri 1939, page 888) and read as follows:

> "(2) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Act;

"(3) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit (not an employer subject to this Act) and which, if subsequent to such acquisition it was treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;"

In filing this memorandum we shall not repeat the authorities which have been set out in the brief filed by the Indiana Unemployment Compensation Board, but we do desire to advise the Court that the decision of the Indiana Court is of substantial importance to every state administering an unemployment compensation law, and respectfully urge the Court to take jurisdiction of this cause so that an authoritative decision may be rendered which will be authority for state administrators in the administration of their respective laws and of assistance and guidance to state supreme courts in the application of appropriate provisions of state constitutions to these statutory provisions.

This section of the Missouri Law, which places all employing units under the ownership or control of the same interests, in the same position as a single employing unit, has been effective time and time again in carrying out the legislative purpose of the Missouri Unemployment Compensation Law. Under the Missouri Law no employer is required to pay the contributions, nor are his workers entitled to the benefits of the Act unless he employs eight or more individuals in one day in each of twenty different weeks during a calendar year. Without the provisions of Section 3 (h)(4), Sections 3 (h)(2) and 3 (h)(3), employing units could easily evade liability under the Law, and thus deprive their workers of the benefits and advantages of the Law, by the division of their establishments or by transferring the business to another employing unit before the required twenty weeks of employing eight or more individuals had occurred. We have made a careful analysis of those employing units who were employers at the close of business, December 31, 1940, and from that

analysis we find that we now have six hundred fifty-two employers currently liable under the Unemployment Compensation Law of this State by virtue of Section 3 (h)(4), who had during the quarter ending December 31, 1940 over eight thousand workers performing services for them during that quarter. These figures indicate a very interesting fact, that is, that the average number of workers actually affected by this provision of the Act during a given three-month period was in excess of twelve persons per employer.

This, of course, is brought about by the fact that the labor turnover in these units is high and the number of individuals employed at a given time vary considerably. In the event this Section 3 (h)(4) of the Law is not sustained, these workers will lose the beneficial effects of this Law and the risk of their unemployment cannot be met by the plan established to absorb this economic loss. We are unable at this time to suggest to the Court the number of employers or workers who are involved under Section 3 (h)(2) and 3 (h)(3) of the Law, but it is our judgment that it would equal, if not exceed, the number affected by Section 3 (h)(4).

We also call attention to the fact that many other employers have, in the past, been held liable because of Section 3(h)(4) and many workers gained benefits under that Section, but because of sales of units, dissolutions, etc., they are not now active employers and hence not included in the above figures.

We respectfully urge upon this court that this statutory provision is a proper and reasonable exercise of legislative authority and entirely consistent with constitutional guarantees. It definitely prevents evasion of the Law, and to a far greater degree than the figures which have been submitted to this court show. And if this Section cannot be sustained there will be many, many employers who are just on the borderline who can easily and profitably divide their business or contract it out under agreements by which they still maintain control and thus avoid the tax liability and deny to their workers unemployment benefits.

The status of this Section of the Missouri Law has been made doubtful by reason of the decision of the Supreme Court of Indiana in this case which followed so closely upon the decision of the Supreme Court of Georgia in the case of *Independent Gasoline Company* vs. *Bureau of Unemployment Compensation of Georgia*, ———— Ga. ————, 10 S. W. 2nd 58, Certiorari denied, ———— U. S. ————, 61 Sup. Court 171 passing upon a similar provision of the Georgia law. These two decisions coming so closely together and involving constitutional provisions substantially similar present very serious obstacles to state boards and commissions charged with the duty of administering and enforcing the provisions of the laws. Not only are employers not heretofore liable under the Law taking issue with the Commission in the application of Section 3 (h)(4) to their operations, but many of the employers who have heretofore complied with the Law are now raising a question as to the validity of this provision. Thus, the status of their workers is under a cloud and some are receiving benefits while others are being denied compensation, at least temporarily, because of the refusal of the employers to comply with the Law, basing their action upon these decisions. Not only that, but if Section 3 (h)(4) is violative of the Federal Constitution and, therefore, invalid, all state agencies should know of that invalidity at the earliest possible moment so that benefits will not continue to be paid to workers who are not under the Law entitled to them, and so that adjustment or refund of contributions erroneously collected can be made to the parties entitled to them before such refunds are barred by applicable limitation statutes. In this connection, reference is made to Section 15 (d) of the Missouri Unemployment Compensation Law, page 920, Laws of Missouri, 1939, which Section limits the authority of the Missouri Commission to refund contributions to contributions which have been erroneously collected and in respect to which application for refund is filed within one year of the date that the contributions otherwise would have been due.

It is certain that substantial expenses will be involved in the clarifying of the status of Section 3 (h) (4) of the Missouri

Law and similar sections of other state laws unless this Court takes jurisdiction of the instant case and determines this issue finally and completely. Because of the substantial and widespread interest in this provision of the law, and because of the particular and special problems which the decisions of the Supreme Court of Georgia and the Supreme Court of Indiana present to the State of Missouri in the administration of the Missouri Unemployment Compensation Law, this State has filed this brief and respectfully prays this court to take jurisdiction in this case and render an authoritative decision on the issues involved.

HARRY G. WALTNER, JR.
Chief Counsel

Unemployment Compensation
Commission, State of Missouri

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 761

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-COREYELL LUMBER COMPANY,

Respondent.

BRIEF FOR THE [illegible]
OF NORTH DAKOTA, [illegible]
SUPPORTING [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INC.

Respondent.

BRIEF FOR THE WORKMEN'S COMPENSATION BUREAU OF THE STATE OF NORTH DAKOTA, ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT.

MAY IT PLEASE THE COURT:

The Workmen's Compensation Bureau of the State of North Dakota, one of whose divisions is the Unemployment Compensation Division of the State of North Dakota, appears on this application as a friend of the Court.

Chapter 232, Session Laws of the State of North Dakota for 1937, as amended by Chapter 215, Laws of North Dakota for 1939, is the Unemployment Compensation Statute of this State and contains at Section 2 (f) (4) thereof the following language:

> "Employer" means:
>
> "Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, or interests, or both, would be an employer under paragraph (1) of this subsection."

It will be noted that this section is identical with that in the Indiana Unemployment Compensation Statute which is the provision in issue in the above entitled action. Inasmuch as the Supreme Court of the State of Indiana has held that the language thus used contravenes the provisions of the Federal Constitution, this Bureau has become materially interested in the outcome of this litigation, especially as it appears there is at stake what this Bureau deems to be a vital prop to the administration of its own unemployment compensation law.

In this petition we are not citing authorities which are already cited and discussed in the brief submitted by the Indiana Unemployment Compensation Board, but wish to draw the attention of the Court to the importance of this particular decision to the administration of the North Dakota Unemployment Compensation Law.

North Dakota is a State containing many small employers. Under the North Dakota Unemployment Compensation Law an employer is not subject to the Act unless he employs eight or more employees for some portion of a day in each of twenty different weeks in any one calendar year.

The common control provision above cited has been found by this Agency to be indispensable in the administration of this law for the reason that many small employers are brought within the

provisions of the law by reason of the fact that they are chain establishments, or owned or controlled by a few companies or interests. For example, at the present time a very large proportion of all the retail business done within this State is done by chain stores or enterprises controlled by a single company. The only reason that the classification set out in the Statute may be considered a reasonable means of relieving small businesses of unnecessary burdens is by the so-called "common control" provision. Were this provision taken from the Statute, it would be an open invitation to evade the law by the division of establishments, and at the same time would free the chain stores and similar businesses of the obligation to contribute to the Unemployment Compensation Fund, which in some measure at least equalizes the competitive difficulty of the small merchant. Without this provision perhaps 8000 workers, or approximately twenty per cent of all the workers covered by the Unemployment Compensation Law of North Dakota, would be denied the protection of the Unemployment Compensation Law.

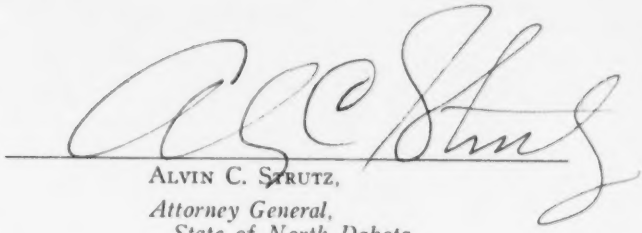
We feel it is hardly necessary to elaborate on the argument of the Indiana Unemployment Compensation Board as to the ease with which the unemployment compensation law could be evaded by astute business techniques without this provision in the Statute.

We also contend that the common control provision above cited will not only avoid an evasion of the law but will also guarantee that businesses in the same general status will be treated alike. It avoids a discrimination which a sharp classification in terms of the employment of eight or more individuals, as now provided in the North Dakota Statute, would certainly cause, and avoids the unfair situation of large scale business organizations being treated differently for the reason that one of such businesses has found it feasible to effect a division of its establishments, while the other has not.

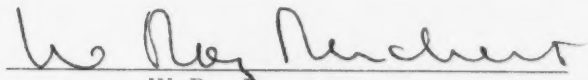
The interest of this Agency in this litigation, flowing from the doubts cast upon the validity of the common control provision, by

reason of the decision of the Indiana Supreme Court, is further based upon the extreme administrative difficulties which have arisen by reason of this decision, and which we trust may now be settled so far as the Federal Constitution is concerned, by a decision of the United States Supreme Court. Following as it did upon the heels of the decision of the Georgia Supreme Court in *Independent Gasoline Company v. Bureau of Unemployment Compensation of Georgia,* 10 S. E. (2d) 58, cert. den. S. Ct. 175, has raised a serious enforcement problem in North Dakota. Many employers who previously accepted this provision of the law without question have now either applied for refunds of contributions previously paid, or have refused altogether to contribute further to the Unemployment Compensation Fund. The status of the workers employed by these employers is now seriously in doubt, and while this Agency is continuing to pay benefits to such workers, the status of such payments may eventually raise a serious question.

We submit therefore, that this matter should be settled at the earliest possible moment and it is for this reason that this State has filed this statement and respectfully requests that this Court take jurisdiction so that an authoritative decision may be given concerning the constitutionality of the provision in question and the administration of an enlightened program of unemployment compensation may proceed unimpeded by dilatory litigation.



ALVIN C. STRUTZ,
Attorney General,
State of North Dakota.



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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED,

Respondent.

BRIEF OF THE MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

GREEK L. RICE,
Attorney General of the State of Mississippi.

C. B. CAMERON,
Attorney and Executive Director, Mississippi Unemployment Compensation Commission,

HARRY M. BRYAN,
General Counsel, Mississippi Unemployment Compensation Commission,

Of Counsel.

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MAY IT PLEASE THE COURT:

The Mississippi Unemployment Compensation Commission, created by and existing under the authority of the Misssissippi Unemployment Compensation Law, appears as a friend of the court. It wishes to manifest and record its interest in the outcome of this litigation. It deems the questions involved herein to be of paramount importance. Directly affected by this action is a provision of the Mississippi Unemployment Compensation Law, considered vital to its effective administration.

The "common control" provision of the Indiana statute is substantially similar to Section 19(h)(4) of the Mississippi Law which is as follows:

"19(h) 'Employer' means:
* * * *

"(4) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection."

By the enactment of the above provision the Mississippi Legislature will be presumed to have had in mind the accomplishment of a definite purpose, consistent with its policies as declared by the Act. Giving due consideration to the existence of certain economic conditions and anticipating the problems of administration, the Legislature, with other impelling reasons, recognized the fact that an employer, with eight or more employees, could easily split his operations into smaller units, each with less than eight employees, and thus take himself from without the basic "coverage" provisions of Section 19(h)(1) of the Law. Further, the Legislature acted to afford the benefits of unemployment insurance to a large class of workers, who, because of employment by smaller units effectively controlled by the same interests, occupy an economic status precisely similar to those performing services for individuals or units having eight or more employees.

This Commission is a party to a proceeding now pending in a court of its state wherein the federal constitutionality of Section 19(h)(4) of the Mississippi Unemployment Compensation Law is attacked. The federal questions involved in the case at bar are present in the suit to which it is a party.

Following the decision of *Independent Gasoline Company v. Bureau of Unemployment Compensation of Geor-*

gia, 10 S. E. (2d) 58, Cert. Den._____U. S._____, 61 S. Ct. 175, the status of many employing units directly affected by the "common control" provision of the Mississippi Act, has rested in doubt and uncertainty. This doubt and uncertainty will continue to exist until final judicial action is had.

Section 14(k) of the Mississippi Unemployment Compensation Law authorizes and empowers this Commission to make refund of contributions, interest and penalties, collected under the Act, "as it may determine were paid erroneously by an employer . . . . " A certain period is provided within which an employer shall make written application for such refund. The written application, filed within the prescribed period, is a condition precedent to the allowance of such refund. It is apparent, therefore, that it is to the manifest interest of this Commission and to employers of doubtful status that there be an authoritative and final decision of the federal questions involved herein as soon as possible. Upon such decision also will depend the rights of many potential claimants under the Act since only those workers who earn wages in "covered" employment are eligible for such benefits.

It is not our purpose to burden the court with a repetition or re-statement of the authorities which have been presented in the brief filed by the Indiana Unemployment Compensation Board. However, in addition to the reasons ascribed above, we respectfully urge that review on writ of certiorari should be had herein because "a state court has decided a federal question of substance not theretofore determined by this court", and, further, "has decided it in a way probably not in accord with applicable decisions of this court", reasons which this court, under its Rule 38, par. 5(a) considers in the exercise of its discretion.

If the decision of the Indiana court is permitted to stand serious questions affecting future rights of this state to classify for purposes of taxation will arise; it will give impetus, undoubtedly, to further litigation involving employers who have already paid contributions under the

Mississippi Law by virtue of the "common control" provision and to actions involving benefit rights thereunder.

The State of Mississippi files this application with its prayer that this court take jurisdiction on appeal in order that a final and authoritative decision may be had concerning the federal constitutionality of the provision in question.

GREEK L. RICE,
Attorney General of the State of Mississippi.

C. B. CAMERON,
Attorney and Executive Director,
Mississippi Unemployment Compensation
Commission.

HARRY M. BRYAN,
General Counsel,
Mississippi Unemployment Compensation
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FEB 28
CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 751

THE INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

vs.

BENNER-CORYELL LUMBER COMPANY, INCORPORATED.

BRIEF FOR THE STATE OF ILLINOIS ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES W. BREEN,
Assistant Attorney General,
Of Counsel.

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BRIEF FOR THE STATE OF ILLINOIS ON THE PETITION FOR WRIT OF CERTIORARI SUBMITTED AS A FRIEND OF THE COURT.

MAY IT PLEASE THE COURT:

The State of Illinois, by its Attorney General, George F. Barrett, appears on this application as a friend of the Court.

The State of Illinois has in its unemployment compensation law a "common control" provision very similar to that of the Indiana Unemployment Compensation Law. It reads as follows:

"Employer means:

* * * * *

"Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, *by legally enforceable means or otherwise,* by the same interests, or which owns or controls one or more other employing units directly or indirectly, *by legally enforceable means or otherwise,* and which, if treated as a single unit with such other employing units or interests or both, would be an employer under paragraph (1) of this subsection."[1] Sec. 2(e)(5) [Ill. Rev. Stat. 1939, Chap. 48, Sec. 218] (Italics supplied.)

Your applicant will not burden this Court with a repetition of the authorities which have been cited and discussed in the brief submitted by the Indiana Unemployment Compensation Board. The State shall confine itself to showing the importance of this issue to the administration of the Illinois Unemployment Compensation Law.

The above quoted provision has been found to be necessary in order that the law may be more effectively and equitably administered. Under the Illinois Unemployment Compensation Law no employer is subject to the Act unless he employs six or more workers. The "common control" provision was intended to prevent evasion of the law by large business organizations through the practice of creating smaller units. Without it, thousands of workers would be denied the benefits intended to be secured by the Unemployment Compensation Act of Illinois. In fact, the law would become another legislative act to be avoided by shrewd business methods. The Indiana Unemployment Compensation Board did not exaggerate in its statement as to the ease with which the law could be evaded without this provision.

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[1] Words in italics are not present in the Indiana law.

If the decision of the Indiana Supreme Court which held this provision to be violative of the Fourteenth Amendment of the Federal Constitution is permitted to stand, by reason of this Honorable Court's refusal to assume jurisdiction, it will serve as an ill-advised precedent to the courts of Illinois in construing the Illinois Act.

It is also urged that the "common control" provision guarantees that businesses in the same general status will be treated on a parity. It avoids unfair competition between two large scale business organizations where one has effectuated a division of its functioning establishments and the other has not.

Furthermore the decision of the Indiana Supreme Court has created a serious enforcement problem in this State. Especially is this true because the Indiana decision came so soon after the similar decision of the Georgia Supreme Court in the case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of Georgia*, ... Ga. ...., 10 S. E. (2d) 58, cert. den. .... U. S. ...., 61 S. Ct. 175. Employers in Illinois operating separate employing units under "common control" are now questioning their liability for contributions heretofore paid under the law and are filing claims for refunds. Some employers are refusing to pay currently due contributions. Employees of the aforesaid employers have been paid benefits by virtue of this provision. Their status, as covered workers, is now in doubt and serious questions have arisen as to the propriety of benefit payments heretofore made and those presently being made.

It is submitted that the decision of the Indiana Supreme Court is ill-advised and ill-considered and has created serious administrative problems for the State of

Illinois. For these reasons we respectfully suggest that this Honorable Court allow the writ of certiorari.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois.

JAMES W. BREEN,
Assistant Attorney General,
Of Counsel.